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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Anthony Harris,) No. 04-1568-PHX-EHC (DKD)
10 Petitioner,)
11 vs.) ORDER
12 Ivan Bartos,)
13 Respondent.)
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16 Petitioner Anthony Harris, presently confined in the Arizona State Prison Complex
17 in Yuma, Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28
18 U.S.C. § 2254. The Court will order an answer.

19 A. **Motion to Proceed In Forma Pauperis.**

20 Petitioner's Application to Proceed *In Forma Pauperis* indicates that his inmate trust
21 balance is less than \$25.00. Accordingly, the Application to Proceed *In Forma Pauperis*
22 (Doc. #1) will be granted.

23 B. **Procedural History.**

24 On August 28, 1998, in Maricopa County Superior Court, matter CR-97-08191,
25 Petitioner was convicted of two counts of forgery and one count of possession of a forgery
26 device. He was sentenced to twelve years on each of the forgery convictions and six years

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1 for the possession of a forgery device conviction. His state court appeals and post-conviction
 2 relief proceedings were unsuccessful.

3 In the present habeas action, he presents five grounds for relief. Each of the first four
 4 grounds combines a claim of ineffective assistance of trial counsel with a claim that the
 5 prosecution committed misconduct by introducing false evidence or suppressing exculpatory
 6 evidence. The fifth ground for relief contends that appellate counsel was ineffective by
 7 failing to withdraw and refusing to raise issues requested by Petitioner.

8 **C. Exhaustion and Procedural Bar.**

9 Before the court may grant habeas relief to a state prisoner, the prisoner must exhaust
 10 remedies available in the state courts. 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526
 11 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Olvera v. Guirbino, 371
 12 F.3d 569, 572 (9th Cir. 2004). To exhaust claims, a petitioner must describe both the
 13 operative facts and the federal legal theory so that the state courts have a "fair opportunity"
 14 to apply controlling legal principles to the facts bearing upon his constitutional claim." Kelly
 15 v. Small, 315 F.3d 1063, 1066 (9th Cir. 2003). In cases not carrying a life sentence or death
 16 penalty, claims are exhausted once the Arizona Court of Appeals has ruled on them. See
 17 Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999), cert. denied, 529 U.S. 1124 (2000).

18 Exhaustion refers only to state remedies that are available at the time of the federal
 19 petition; if the petitioner failed to pursue state court remedies and can no longer raise them
 20 through any state mechanism, the claims are considered exhausted. Franklin v. Johnson, 290
 21 F.3d 1223, 1231 (9th Cir. 2002). When further review of the claims is precluded in state
 22 court, the claims are considered to be "procedurally barred" and do not require dismissal by
 23 the federal court. Id. at 1230-31 (explaining difference between exhaustion and procedural
 24 bar).

25 Petitioner claims that he sought to raise each of his issues in the Arizona Court of
 26 Appeals, which directed him to raise them in a post-conviction proceedings pursuant to Rule
 27 32 of the Arizona Rules of Criminal Procedure. According to Petitioner, when he attempted
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1 to do so, he was precluded. Petitioner does not identify the reason for the preclusion.
 2 Consequently, it is not clear whether the grounds were fairly presented and thus exhausted,
 3 or whether there was a procedural bar to review of his claims in the Rule 32 proceedings.
 4 Regardless, further state court review of his claims does not appear to be presently available.
 5 In light of the possibility of procedural bar, a summary dismissal would be inappropriate.
 6 See Castille v. Peoples, 489 U.S. 346, 351-52 (1989) (remanding where petitioner failed to
 7 exhaust claims and it was not clear whether claims were procedurally barred). An answer
 8 is therefore required. 28 U.S.C. § 2254(a).

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10 **IT IS THEREFORE ORDERED:**

- 11 (1) That Petitioner's Application to Proceed *In Forma Pauperis* (Doc. #1) is granted;
- 12 (2) That a copy of the Petition and this Order be served by the Clerk of Court upon
 the Respondent and the Attorney General of the State of Arizona by certified mail pursuant
 to Rule 4, Rules Governing Section 2254 Cases;
- 13 (3) That Respondent answer the Petition within 40 days of the date of service.
 Respondent shall not file a dispositive motion in place of an answer without first showing
 cause as to why an answer is inadequate. If the Petition was filed after the expiration of the
 1-year period of limitation as defined in 28 U.S.C. § 2244(d), the answer may be limited
 solely to that issue and, if limited to that issue, only those portions of the record relevant to
 the limitations issue shall be attached to the answer. If the timeliness of the Petition is not
 in question, the answer shall fully comply with all of the requirements of Rule 5 of the Rules
 Governing Section 2254 Cases;
- 14 (4) That Petitioner shall serve upon Respondent, or if appearance has been entered
 by counsel, upon the attorney, a copy of every further pleading or other document submitted
 for consideration by the Court. Petitioner shall include with the original document and copy,
 to be filed with the Clerk of the Court, a certificate stating the date a true and correct copy
 of the pleading or document was mailed to Respondent or the counsel. Any paper received

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1 by a District Court Judge or Magistrate Judge which has not been filed with the Clerk of the
2 Court may be disregarded by the Court;

3 (5) That at all times during the pendency of this action, Petitioner shall immediately
4 advise the Court of any change of address and its effective date. Such notice shall be
5 captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only
6 information pertaining to the change of address and its effective date. The notice shall not
7 include any motions for any other relief. Failure to file a NOTICE OF CHANGE OF
8 ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to
9 Federal Rule of Civil Procedure 41(b);

10 (6) That aside from the two copies of the petition or amended petition that must be
11 submitted pursuant to Local Rule 3.2(a), a clear, legible copy of every pleading or other
12 document filed shall accompany each original pleading or other document filed with the
13 Clerk for use by the District Judge or Magistrate Judge to whom the case is assigned. See
14 Local Rule of Practice 1.9(f). Failure to comply with this requirement may result in the
15 pleading or document being stricken without further notice to Petitioner; and

16 (7) That this matter is referred to Magistrate Judge David K. Duncan pursuant to
17 Local Rules 1.16 and 1.17 for further proceedings and a report and recommendation.

DATED this 10 day of August, 2004.

East 18th Avenue

Earl H. Carroll
United States District Judge